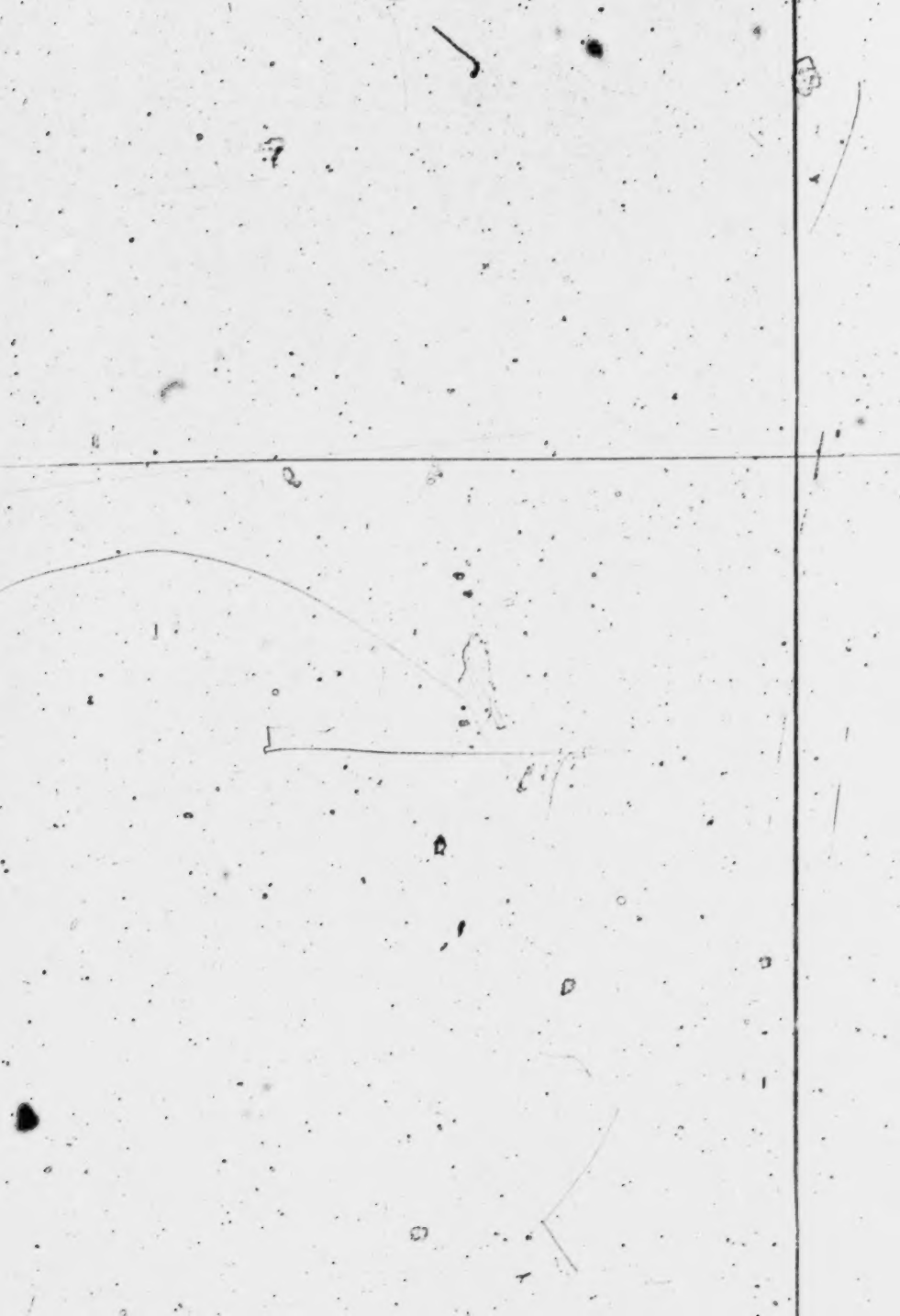

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IN THE

Supreme Court of the United States

October Term, 1964
No. 935

FRANK M. JORDAN, as Secretary of State of California, EDMUND G. BROWN, as Governor of the State of California, THOMAS C. LYNCH, as Attorney General of the State of California, and THE SENATE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA,

Appellants,

vs.

PHILL SILVER,

Appellee.

BRIEF FOR APPELLANTS, OPPOSING MOTION TO DISMISS OR AFFIRM.

Preliminary Statement.

First: Appellee's motion to dismiss or affirm was filed 31 days after the time allowed by Rule 16(1).[1] A motion by appellants to strike it is pending. Nonetheless, in order not to be caught in a time problem ourselves we present this brief in opposition to the appellee's motion. By doing so we do not intend to waive the untimeliness of the motion to dismiss, or to abandon our motion to strike it. Jurisdiction as such is

[1]The Statement As To Jurisdiction was served on appellee on February 24, 1965. The Motion to Dismiss or Affirm was filed on April 26, 1965, whereas the last day for that purpose was March 26, 1965.

obviously conceded by appellee, as the motion to dismiss is made on the sole ground of the unsubstantiality of the question.

Second: This case is significantly different in at least two important respects from the legislative-apportionment cases that have preceded it here. Because of these differences the case is not one for summary disposition, but one needing full briefing and argument and plenary consideration.

The case is different in the first place because, in one of its aspects, it brings up for review not merely an existing plan of apportionment but also a judicial mandate to the Legislature of the State of California ordering it to reapportion its Senate on a basis of districts of equal population. The order does not, however, chart a course around or through the various restrictive provisions of the State constitution which must inevitably affect the kind of redistricting that may be accomplished, even though that districting may comply with the order below.

The Legislature has not been told whether, in order to comply with the order, it may devise a Senate of more than forty members; or unite part of a county with another; or divide a county into more than one Senatorial district; or group counties of small population in a district having more than three counties; or make up a district out of non-contiguous territory. None of these districting devices is open under the State Constitution, which expressly prohibits them all. [*Cal. Const.*, art. IV, sec. 6; *Statement as to Jurisdiction*, Appendix "C", pp. 25-26.] Whether any of the prohibitory provisions is unconstitutional under the Equal Protection Clause is, of course, a Federal question [*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547]; but whether any of them is valid under the State constitution and severable from the others, is a State question. [*White*

v. Anderson, ____ Colo. ____, 394 P. 2d 333, 335, 337; *Morey v. Doud*, 354 U.S. 457, 470 (n.16); *Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562; *Dorchy v. Kansas*, 264 U.S. 286, 289-290.]

Except for *Forty-Fourth General Assembly of the State of Colorado v. Lucas*, 379 U.S. 693, in which there was a similar factual situation and in which this Court, deferring to the State court's determination of the State constitutional question [*White v. Anderson, supra*, 394 P. 2d 333], ordered reconsideration of a Federal apportionment decree in the light of the State decision, every case that has been here has been one in which the question presented was only the validity of a specific plan of apportionment upon which the lower court had passed. Whether in such a case, the plan conforms to the basic requirements of *Baker v. Carr*, 369 U.S. 186, and *Reynolds v. Sims*, 377 U.S. 533, is a question that may well adapt itself to summary disposition, as nothing new in the way of legal principles or analysis of differentiating facts is presented.

That is not the situation in the instant cause. Here we are concerned with a prospective plan—one yet to be framed but which must be framed to accord not alone with the Federal constitution but as well with the constitutional and severable provisions of the State constitution. Whether in that process the State courts should be given an adequate opportunity to speak on the State constitutional issues is not only a substantial but a grave question. A decent regard for the Federal-State relationship must give one considerable pause before cutting out of a State constitution provisions that are severable from those upon which the Federal axe has fallen, and which provisions the people of the State, acting directly in their own right, have deliberately selected. [See, *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176.]

So, too, if, for reasons of time or other expediency, the State courts are to be by-passed, it is a substantial question whether the Federal court that has the matter in hand may or should decide the State questions in order that there may be some sort of a blueprint for the construction job that has been imposed on the State legislature. If that court is to decide the questions, it should be told that, for at bar it has not done so.

The case here is also different from its predecessors, because of the facts that bear upon the history of and the reasons for California's present legislative structure. These facts are different in nature and extent from those involved in other cases. Not only is the whole problem of legislative reapportionment one for case-by-case consideration [*Reynolds v. Sims, supra,* 377 U.S. at 578], but so too is the question whether any given classification is a justifiable one under the Equal Protection Clause. [*Cf., Tigner v. Texas,* 310 U.S. 141, 145-147, 149; *Williamson v. Lee Optical,* 348 U.S. 483, 489.] While general principles may be the same in each case, the facts claimed to justify the classification are different. Precedents, therefore, are not necessarily factually apposite to the new facts.

It is the Equal Protection Clause, of course, and the judicial standards under it that must govern decision when a legislative apportionment is challenged as discriminatory. [*Baker v. Carr, supra,* 369 U.S. at 226.] Classification is essentially a factual question. The facts that bear on California's legislative system are complex and extensive. More than summary consideration is needed to assimilate and appreciate them.

Supplement to Statement of the Case.

Appellee takes no exception to the Statement of the Case presented in the Statement as to Jurisdiction. It may, therefore, be accepted as correct. It now needs some slight supplementation because of developments since it was prepared, and of the nature of appellee's argument.

1. On April 21, 1965, an action seeking a declaratory judgment to determine which, if any, of the provisions of the California Constitution may be ignored by the State Legislature in reapportioning the Senate in attempted compliance with the order here under appeal, has been commenced and is now pending in the Superior Court of the State of California for the County of Sacramento. The appellee, individually and as the representative of the class he claims to represent in the instant cause, is the defendant in that action. Among the plaintiffs is appellant here, The Senate of the Legislature of the State of California. It is the intention of the Senate to prosecute that action diligently and expeditiously to final judgment in the highest court of the State to which it may be taken.

There is now pending in this Court a motion made by appellant Senate to take judicial notice of the official records of that State-court action. Appellee argues the merits of the question that is raised by the pendency of the litigation. [*Motion To Dismiss*, pp. 19-20.] He does not, however, deny the power of the Court to take that notice or the propriety of taking it. Indeed, appellee implicity concedes that notice should be taken, as his argument is premised on the facts that we seek to have noticed as well as others relating to the action.

2. While the state action just described was not then pending, the court below in the instant cause was requested generally to "abstain from exercising any

jurisdiction herein until after the State, acting through its appropriate departments of government has had a reasonable time and opportunity to do whatever may be necessary to bring itself into conformity with applicable federal law relating to legislative apportionment . . ." [*Answer in Intervention of the Senate of the Legislature of the State of California*, p. 12. See also, *Rep. Tr. of Proceedings*, Sept. 2, 1964, p. 75, lines 1-17.]

3. Appellee's request for relief and the showing made below in support of his position consisted, for all practical purposes, of nothing more than the numbers of people in each Senatorial district according to the 1960 Census of Population. [See, *Rep. Tr. of Proceedings*, Sept. 2, 1964, p. 14, line 23, to p. 17, line 14; *Complaint*, p. 9, line 14, to p. 15, line 10; *Stipulated Statement of Facts*, pp. 1, 2.]

4. There is pending in the California Senate a bill, Senate Bill 6, which, if adopted will reapportion the Senate on a population basis. In the course of attempting to effect such reapportionment, however, serious questions whether the bill violates the provisions of section 6 of Article IV of the California Constitution in several respects arise.[2] The pendency and tenor of the bill may be judicially noticed as a public act of the legislative department of the State. [*Cal. Code of Civil Procedure*, sec. 1875(3) and see, *Alaska v. American Can Co.*, 358 U.S. 224, 226-227.]

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[2]Counties of small population are placed in a district having more than three counties; some counties are given more than one senator each; some counties are divided into more than one senatorial district. The California Constitution, Article IV, section 6, prohibits such districting devices. It also requires that the Senate consist of forty members, elected from forty districts. Before there can be any assurance that Senate Bill 6, or any other plan of apportionment, is valid the validity and effect of the plan under these provisions of the State constitution must be authoritatively decided.

ARGUMENT.

I.

Whether on the Facts There Is a Rational Basis for California's Classification Is a Substantial Question Not Answerable Summarily.

No doubt the question of legislative malapportionment, whatever it may once have been, is now a justiciable one. *Baker v. Carr*, 369 U.S. 186 saw to that. But in making the question justiciable, this Court also made it pretty clear that the criteria of decision would be the "well developed and familiar" judicial standards under the Equal Protection Clause. [369 U.S. at 226.] Differential classification based upon rational and relevant differences between classes is one of those standards. [*McGowan v. Maryland*, 366 U.S. 420, 425-426; *Allied Stores v. Bowers*, 358 U.S. 522, 527.] The question whether there is a rational basis for a classification that is under attack is necessarily dependent upon the facts peculiar to the individual case. It cannot ordinarily be properly disposed of by formula or by a doctrinaire or inflexible adherence to *stare decisis*. Grounds of differentiation in California, are not the same or necessarily as ineffective as those that were urged in Tennessee's or Georgia's cases.

In assailing the classification reflected by the California Constitution, appellee relied only on population numbers and an inflexible application of the formula "one man, one vote." Yet, in announcing, and since applying that formula this Court has indicated that some leeway may exist so that numerical equality need be only approximate and that appropriate consideration may be given to factors other than a head count. [See, *e.g., Forston v. Dorsey*, 379 U.S. 433, 436; *Reynolds v. Sims*, 377 U.S. 533, 577-579.]

In opposition to appellee's arithmetical showing appellants countered with a comprehensive presentation and analysis of demographic, geographic and economic data that demonstrated such differences between sections of the state and the interests and necessities of the people residing in them as to supply a rational basis for the classification under attack. [See, *Intervener's Memorandum re Judicial Notice, passim.*] It is evidence of the substantiality of the question that the court below was of the opinion that this showing, but for *Baker v. Carr, supra,* "would have been highly persuasive . . ." [*Statement As To Jurisdiction,* Appendix "A", p. 16.] It is not, therefore, an unsubstantial question, whether the specific facts making up that "highly persuasive" showing do differentiate California's case from Tennessee's or Georgia's sufficiently to enable the "well developed and familiar" judicial standard of classification to operate. The facts are extensive and complex. Plenary, not summary, consideration is needed to assimilate them and appreciate their significance.

II

California's Case Is Different, Because There Is an Effective Political Remedy, by Use of Which the People Have Made a Definitive Choice.

The question whether the people of a State, having an opportunity to make a clear cut choice, may select the kind of representative assembly they desire, is not one that is disposed of by a mere citation to *Lucas v. Colorado General Assembly,* 377 U.S. 713. The rejection in that case of the selection made by the people of Colorado was surely influenced by the fact that each plan proposed to the electorate had debatable or unpopular features so that, as this court said, "neither of the proposed plans was, in all probability, wholly acceptable

to all voters in the populous counties; and the assumption . . . that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that 'minority process in the Senate is what they want' does not appear to be factually justifiable." [377 U.S. at 731.]

In California, however, the voters did made a "definitive choice." The two plans put to them in 1926 were identical, except for the composition of the Senate. By the same token, it is always possible in California for the majority against whom the present apportionment is said to discriminate, to eliminate the asserted basis in the State constitution of that discrimination in the same way it was adopted—by direct legislative action at the polls. It is a fact of significance in this regard that four attempts to make that change have failed to command a popular majority. These facts substantially differentiate California's situation from Colorado's and from those of the States in which no effective political remedy for malapportionment is available. The question whether they are enough to require a different litigative result is just as substantial.

III

There Is a Substantial Question Presented Whether the State Courts Should Be Given an Opportunity to Speak on the Questions of State Law Necessarily Involved in Any Re-Apportionment.

First: Not the slightest suggestion has been made by u that a provision of a State constitution cannot be held nconstitutional under the Federal constitution. [See, *Motion to Dismiss*, pp. 13-15.] What we did and do sug est, however, is that while the California legislature s been ordered by the judiciary to re-apportion, it has not been told whether and to what extent it may disregard the provisions of its own constitution

in complying with that order. [*Juris. Statement*, pp. 19-21.] No doubt, to the extent that such provisions prevent an apportionment that meets, or compels one that violates, Federal constitutional requirements, they are unconstitutiinal. But which of California's provisions are in this category? And, whichever ones they may be, are they severable from the others? The order of the court below neither answers these questions nor provides standards from which the answer may be derived.

If only some of those provisions fall as the consequence of the Federal constitution, and those are severable, the remaining ones obviously must be observed by the State legislature. That was precisely the situation in Colorado—the situation that impelled this Court, notwithstanding its affirmance of a decree holding Colorado's plan federally constitutional, to vacate that decree and remand the cause for further consideration of the parts of it that dealt with validity under the State Constitution, in the light of the supervening decision of the State Supreme Court in *White v. Anderson, supra*, 394 P. 2d 333. [*Forty-Fourth General Assembly of the State of Colorado v. Lucas*, 379 U.S. 693.] California is now in the same situation, for the jurisdiction of the State courts has been invoked to determine what is left of the State constitution's provisions respecting the composition of the Senate. Obviously, in view of the result in second *Lucas*, that is, at least in the first instance, a question for the State courts. Also, *Morey v. Doud, supra*, 354 U.S. at 470 (n. 16); *Wolff v. Court of Industrial Relations, supra*, 267 U.S. at 562; *Dorchy v. Kansas, supra*, 264 U.S. at 289-290.]

It may be that when that answer is vouchsafed the plan now being considered in the legislature, Senate Bill 6, will be seen to be valid under the State constitution, thus leaving for the Federal courts only the question

of its validity under the Federal constitution. Or it may be found obnoxious to the State constitution, thus requiring a new one to comply with it and the order of the court below. Either way, the path to a plan that will meet both the order below and the State constitution will be clear. Whether this Court's latest action in respect of Colorado is a sufficiently close precedent to entitle California to the same kind of reconsideration is a substantial question.

No doubt, as appellee says [*Motion to Dismiss*, p. 16], the constitutional provisions of Colorado and California are not identical. They are the same, however, in prohibiting division of a county; and there are other provisions that a Legislature reapportioning the California Senate must consider as well. Perhaps, it is California's additional requirement that there be only one senator to a county which results in the malapportionment interdicted below. If so, it must fall. That fall does not necessarily bring down with it all else in the State constitution bearing on the composition of the Senate.

The court below did not hold that any specific provision of the State constitution was bad. It dealt only with the existing apportionment in fact, not with its causes. Whatever that cause in the State constitution may be, the possibility or even the probability that it is severable from the other provisions exists and cannot be ignored. The situation, then, becomes exactly like Colorado's. In view of this Court's action in *Forty-Fourth Assembly v. Lucas, supra*, it is a substantial and fairly debatable question whether the California legislature should be compelled to reapportion itself without being told by the State courts what it may and may not do in respect of disregard of the State constitution.

No doubt this Court has acted summarily in a number of legislative apportionment cases. [See *Motion to Dismiss*, pp. 17-18.] In some of them, *e.g.*, *Scholle v.*

Hare, 369 U.S. 429, the lower court had acted before *Baker v. Carr, supra*, had been decided. Remand was ordered to permit the effect of *Baker* to be considered. In each of the cases, whether decided below before or after Baker, a specific plan was before the Court. The guidelines deducible from *Baker* and *Reynolds* were sufficient for decisional purposes in respect of those plans. No questions of State law or of factual differentiation from the earlier cases, or of providing guidelines for prospective legislation that had to comply with State constitutional standards too, were involved. The instant case does not present such a readily identifiable pattern. The guidelines are yet to be set; and it is the right of the State courts to express and have considered their views on the questions of State constitutional law that have arisen.

Second: The purpose of having judicial notice taken of the pending action in the State courts, is to show that efforts are being made in the proper quarters to get the guidelines that are needed to create a California legislature that will meet controlling State standards as well as those of the Federal constitution. Accordingly, the way is open to permit the State questions to be settled in the forum in which they should be settled. Once settled there, the Federal judiciary is bound by the result. The effect of such a settlement upon the kind of a legislature that may or will be created and, therefore, upon the question of conformity to the Federal constitution, is obvious.

This is not an intentional delaying action. Sooner, or later, whatever legislative system may eventuate in

California will have to be tested against the valid provisions of the California constitution, preferably by the State Courts, necessarily mayhap by the Federal courts. Whether that system turns out to be the one now embodied in Senate Bill 6, or some other plan devised by the Legislature, or one devised by the court below, test of it under the State constitution will ultimately have to be made. A Federal court, using its powers to reapportion a State legislature, cannot and should not, even if it could, ignore valid State law any more than in a case involving the validity of a private contract made in the State. To permit the questions of State law now pending in the State court with respect to the validity and severability of the provisions of the State constitution relating to legislative apportionment, to be decided before the Federal judiciary acts finally, will in the long run save rather than lose time and it will preserve the balance of power between State and Nation.

Third: It is neither necessary nor fitting to attempt now and on appellee's motion to dismiss, to prejudge the outcome, procedurally or on the merits, of the State litigation. Appellee seems to believe the State courts will decline jurisdiction. [See, *Motion to Dismiss,* pp. 19-20.] No reason is shown why they should do so, now that they have the example of the Colorado litigation to follow. Furthermore, the Supreme Court of the State has already pointed out that an action for a declaratory judgment, like the one now pending, is a proper means of obtaining determination of the validity of the State constitutional and statutory provisions relating to ap-

portionment.[3] [*Yorty v. Anderson*, 60 Cal. 2d 312, 317, 33 Cal. Rptr., 97, 100, 384 P. 2d 417, 420.] The question whether the State courts will take jurisdiction may, and indeed will be quickly settled, as proceedings to that end, set to be heard May 14, 1965, have already been started by appellee in the form of a motion to dismiss on the ground of comity and prior pendency of the Federal litigation.[4]

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[3]The cases cited by appellee are clearly different. In *State v. Meier*, (N.D.), 127 N.W. 2d 665, the State Court, as a matter of comity declined to hear the precise question of validity under the *Federal* constitution that the parties petitioning the State court to act had voluntarily submitted to a Federal court. These parties came to the State court, reserving their right to get a final decision from the Federal court, because the latter court had abstained in order to give the State court an opportunity to pass on the questions. The State court, however, while declining to decide the Federal questions, did act to decide questions that had been raised under the State constitution. That is exactly and all that the California courts have been asked to do in the pending litigation.

In *Pacific Electric Ry. Co. v. Dewey*, 95 Cal. App. 2d 69, 212 P. 2d 255, cited by appellee, a court's discretionary declination of jurisdiction in a declaratory relief suit was upheld because the suit was being used as a means of escaping a jury trial in a pending action at law between the same parties in which the identical issues were involved. At bar, the State issues are different issues from those at stake in the Federal litigation. The State case is concerned, as was the Colorado court in *White v. Anderson*, *supra*, 394 P. 2d 333, with questions under the State constitution, the Federal court with questions under the Federal constitution.

[4]This is another of the facts appearing in the records of the State court and, thereiore, a proper subject of judicial notice, for the reason noted in our Motion To Take Judicial Notice, p. 3, lines 18-32.

CONCLUSION.

The Motion To Dismiss Or Affirm, if not stricken, should be denied and probable jurisdiction noted.

Respectfully submitted,

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